17.

SUPREME COURT OF THE UNITED STATES.

No. 90.

JAMES N. AND LEVI DICKSON, PLAINTIFFS,

vs.

WILLIAM H. WILKINSON, ADMINISRATOR OF JOHN T. WILKINSON DECEASED.

ON A CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT U. S. MIDDLE DISTRICT OF TENNESSEE.

Pleas at the court house in the city of Nashville, on the first Monday being the fourth day of September, in the year one thousand eight hundred and thirty-seven, and in the sixty-second year of the independence of the United States, before the Honorable John Catron, one of the associate justices of the Supreme Court of the United States, and the Honorable Morgan W. Brown, judge of the courts of the United States for the districts of East and West Tennessee.

J. N. AND L. DICKSON, Plaintiffs.
vs.
WILLIAM H. WILKINSON, Administrator, Defendant. } Debt.

William H. Wilkinson, administrator of the estate of John T. Wilkinson deceased, and a citizen of the State of Tennessee, was attached to answer James N. Dickson and Levi Dickson, citizens of the State of Pennsylvania, and trading in partnership under the firm of J. N. & L. Dickson, of a plea that he render to them eleven hundred and sixty-nine 88-100 dollars, which from them he detains to their damage two hundred dollars. And thereupon at August rules 1837, the plaintiffs by their attorney filed their declaration, which is as follows, to wit:

CIRCUIT COURT OF THE UNITED STATES,
District of West Tennessee.

James N. Dickson and Levi Dickson, citizens of the State of Pennsylvania, and trading in partnership under the firm of J. N.

& L. Dickson, complain of William H. Wilkinson, administrator of the estate of John T. Wilkinson deceased, and a citizen of the State of Tennessee, of a plea that he render to them eleven hundred and sixty-nine 88-100 dollars, which to them he owes and from them he detains. For that John T. Wilkinson in his lifetime, on the 17th of August 1835, at Philadelphia, to wit, at Nashville in the district aforesaid, made his certain promissory note in writing, now shewn to the court, and thereby six months after date promised to pay the plaintiffs eleven hundred and sixty-nine 88-100 dollars for value received. Yet the said John T. Wilkinson in his lifetime, and the said defendant since his death, although often requested have not, nor hath either of them paid the same to the plaintiffs, but wholly neglect and refuse to do so to their damage two hundred dollars, and therefore they sue by their attorney Foster and Fogg.

And at said August rules 1837, the plaintiffs by their attorney give a rule for a plea; and at September rules 1837 no plea having been filed, plaintiffs take judgment by default.

Monday, 4th September 1837, the plaintiffs by their attorney appear, and the defendant in proper person who says, that he cannot deny but that his intestate in his lifetime was indebted to the plaintiffs in manner and form as they in declaring have alledged, nor but that they have sustained damage by reason of the detention of that debt, to the amount of one hundred and ten dollars and ninety-four cents. But it appearing to the satisfaction of the court from the admission of the plaintiffs, that no assets of his intestate have come to the hands of the defendant to be administered, it is therefore considered by the court, that the plaintiffs recover of the defendant their debt of eleven hundred and sixty-nine dollars and eighty-eight cents, and also their damages aforesaid, and their costs about their suit in this behalf expended, and that they have their execution, to be levied of the goods and chattels and assets of his intestate, which may hereafter come to the hands of the defendant to be administered.

The President of the United States to the Marshal of West Tennessee, greeting:

You are hereby commanded, that of the goods, chattels and assets of John T. Wilkinson, which may hereafter come to the hands of William H. Wilkinson his administrator, to be administered in your district, you cause to be made twelve hundred and ninety-eight dollars seventy-five and two third cents, which Joseph N. Dickson and Levi Dickson in the circuit court of the United States for the eighth circuit in the district of West Tennessee, recovered against him for debt, damages and costs in a certain action of debt in the said court lately determined, wherein the said Joseph N. and Levi Dickson were plaintiffs and said William H. Wilkinson

was defendant, whereof said defendant is convict, as appears of record, and have the said money ready to render before the judge of our said court at Nashville on the first Monday in March next herein fail not, and have you then and there this writ.

Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this first Monday in September A. D. 1837, and in the 62d year of our independence.

Issued 30th September 1837.

N. A. McNAIRY, *Clerk.*

Came to hand same day issued.

S. B. MARSHALL, *M. W. T.*

No property found in the hands of the administrator to levy this fieri facias.

S. B. MARSHALL, *M. W. T.*

UNITED STATES OF AMERICA *ss.*
District of Middle Tennessee.

I, Jacob M. Govock, clerk of the circuit court of the United States for the district aforesaid, do certify that the foregoing is a correct transcript of the record of the suit J. N. and L. Dickson against William H. Wilkinson, administrator.

In testimony whereof I have hereto subscribed my name and affixed the seal of said court, at office, in Nashville, this 14th day of October A. D. 1840.

[L. S.]

JACOB M. GOVOCK.

Pleas at the courthouse in the city of Nashville on the first Monday, being the fourth day of September, in the year of our Lord one thousand eight hundred and thirty nine, and in the sixty-fourth year of the Independence of the United States, before the Honorable John Catron, one of the associate justices of the Supreme Court of the United States, and the Honorable Morgan W. Brown, judge of the courts of the United States for the districts of East, West and Middle Tennessee.

J. N. AND L. DICKSON, Plaintiffs,
vs.
WILLIAM H. WILKINSON, Administrator, Defendant. } sc. fa.

Be it remembered, that heretofore to wit, on the 10th day of January 1839 a writ of scire facias was issued from this office, which is as follows, viz:

The President of the United States of America, to the Marshal of West Tennessee District, greeting:

Whereas, heretofore to wit, on the fourth day of September in the year 1837, in the circuit court of the United States for the

district of West Tennessee aforesaid, in a certain suit prosecuted and determined therein between Joseph N. Dickson and Levi Dickson, citizens of the State of Pennsylvania, and merchants in partnership, under the firm and style of J. N. & L. Dickson, plaintiffs, and William H. Wilkinson, administrator of the goods and chattels, rights and credits of John T. Wilkinson deceased, and a citizen of the State of Tennessee, defendant, it was adjudged and considered by the said court, that the plaintiffs recover of the defendant the sum of seven hundred and sixty-nine dollars and eighty-eight cents, their debt in the declaration mentioned, and the further sum of one hundred and ten dollars and ninety-four cents, their damages sustained by reason of the detention thereof, and their costs about their suit in that behalf expended, being the further sum of eighteen dollars and forty-seven cents, and that they have their execution, to be levied of the goods, chattels and assets of his intestate, which might thereafter come to the hands of the defendant to be administered.

And whereas, afterwards to wit, on the 2d day of October 1838, it was suggested to the said court, on behalf of the said plaintiffs, that goods, chattels and assets had come to the hands of the defendant sufficient to satisfy the said judgment, and it was thereupon ordered by the said court that a scire facias issue.

We therefore command you the said marshal, to make known to the said William H. Wilkinson, the tenor of this writ, and summon personally to be and appear before the judges of our said court, at the courthouse in Nashville, on the first Monday in March next, then and there to shew cause if any he has or knows of, why execution shall not be issued upon said judgment to be levied of the assets so received by him. Herein fail not, and have you then and there this writ, and make known how you have executed the same.

Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this first Monday in September in the year 1838, and in the sixty third year of our Independence.

N. A. McNAIRY, *Clerk*, &c.
By P. HAG.

Upon which writ of sci. fa. is the following return, to wit: Come to hand same day issued, and made known to the defendant 11th January 1839.

M. H. QUINN, *D. M.*

March rules 1839, rule for plea by the 8th instant, March 8th, 1839, judgment by default.

TUESDAY, *September* 3, 1839.

The plaintiffs by their attorney appear, and a judgment by default having been entered in this cause on the 8th of March last, and no motion having been made to have the same set aside it is therefore, on motion of the plaintiffs by their attorney, con-

sidered by the court, that said judgment by default be affirmed, and that the plaintiffs have execution of the debt and costs in the scire facias mentioned, to wit, for eight hundred and eighty dollars and eighty-two cents debt and damages, with interest thereon at the rate of six per cent. per annum from the fourth day of September 1837 until this day, being the further sum of one hundred and five dollars and fifty cents, making together the sum of nine hundred and eighty-six dollars and thirty-two cents, and for eighteen dollars and forty-seven cents the costs of the original suit in the scire facias mentioned, and also for the costs of sueing forth and procecuting the said scire facias, to be levied of the goods, chattels and assets of his intestate the said John T. Wilkinson in his hands to be administered, if so much in his hands to be administered there be, and if so much there be not, then the costs aforesaid to be levied of the proper goods and chattels, lands and tenements of the defendant.

On which judgment issued the following fieri facias.

The President of the United States to the Marshal of Middle Tennessee, greeting:

You are hereby commanded, that of the goods, chattels and assets of John T. Wilkinson deceased, in the hands of William H. Wilkinson, his administrator, to be administered in your district you cause to be made nine hundred and eighty-six 32-100 dollars, for debt and damages, and thirty-five 19-100 dollars for costs, if so much in his hands to be administered there be, and if so much there be not, then the costs aforesaid you shall cause to be made of the proper goods and chattels, lands and tenements of the said William H. Wilkinson, which Joseph N. Dickson and Levi Dickson in the circuit court of the United States for the eighth circuit in the district of Middle Tennessee recovered against him for debt, damages and costs in a certain action of debt in the said court lately determined, wherein the said J. N. and L. Dickson were plaintiffs, and said William H. Wilkinson administrator, was defendant, whereof said defendant is convict as appears of record, and have the said money ready to render before the judge of our said court at Nashville on the first Monday in March next. Herein fail not and have you then and there this writ.

Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this first Monday in Septemper A. D. 1839, and in the 64th year of our Independence.

JACOB M. GOVOCK, *Clerk.*

Iss. 9th October, 1839.

On which execution the marshal made the following return, to wit:

Came to hand 22d October 1839.

S. B. MARSHAL, *M. M. T.*

No property found in the hands of William H. Wilkinson to be administered whereon to levy this fieri facias.

S. B. MARSHAL, *M. M. T.*

UNITED STATES OF AMERICA,
District of Middle Tennessee.

I, Jacob M. Govock, clerk of the United States for the district aforesaid, do certify, that the foregoing is a true transcript of the record of said court of the suit J. N. and L. Dickson, plaintiffs, against Wm. H. Wilkinson, administrator and defendant.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in Nashville, this 14th day of October A. D. 1840.

[L. S.]

J. M. GOVOCK.

Pleas at the courthouse in the city of Nashville on the first Monday, being the seventh day of September, in the year of our Lord one thousand eight hundred and forty, and in the sixty-fifth year of the Independence of the United States.

Present: The Honorable John Catron, one of the associate justices of the Supreme Court of the United States, and the Honorable Morgan W. Brown, judge of the courts of the United States for the district, of East, Middle and West Tennessee.

J. N. AND L. DICKSON, Plaintiffs,
vs.
WILLIAM H. WILKINSON, Defendant. } Scire facias.

Be it remembered, that heretofore to wit, on the 22d day of June 1840, a writ of scire facias was issue dfrom the office of said court, which is as follows, to wit:

The President of the United States of America to the Marshal of West Tennessee District, greeting:

Whereas, heretofore to wit, on the fourth day of September in the year 1837, in the circuit court of the United States for the district of West Tennessee aforesaid, in a certain suit prosecuted and determined therein between Joseph N. Dickson and Levi Dickson, citizens of the State of Pennsylvania, and merchants in partnership under the firm and style of J. N. & L. Dickson, plaintiffs, and William H. Wilkinson, administrator of the goods and chattels, rights and credits of John T. Wilkinson deceased, and a citizen of the State of Tennessee, defendant, it was adjudged and considered by the said court, that the plaintiffs recover of the defendant the sum of seven hundred and sixty-nine dollars and eighty-eight cents, their debt in the declaration mentioned, and the further sum of one hundred and ten dollars and ninety-four cents, their damages sustained by reason of the detention thereof, and their costs about their suit in that behalf expended, being the further sum of eighteen dollars and forty-seven cents, and that they have their execution, to be levied of the goods, chattels and assets of his intestate, which might thereafter come to the hands of the defendant to be administered.

And whereas, afterwards to wit, on the 2nd day of October 1838, it was suggested to the said court on behalf of the said plaintiffs, that goods, chattels and assets had come to the hands of the defendant sufficient to satisfy the said judgment, and it was thereupon ordered by the said court, that a scire facias issue, &c.

And whereas, a scire facias issued on the 10th of January 1839, returnable the first Monday in March next ensuing, commanding, &c.

And whereas, on the third day of September 1839, in said circuit court, on said scire facias prosecuted and determined thereon, between the said Joseph N. and Levi Dickson, plaintiffs, and said William H. Wilkinson, administrator of said John T. Wilkinson deceased, it was adjudged and considered by the said court, that the plaintiffs have execution of their debt, damages and costs in the scire facias mentioned, to wit, for $880 82 debt and damages, with interest thereon at the rate of six per cent. per annum from the 4th of September 1837 until this day, being the further sum of $105 50 making together the sum of $986 32 and for $18 47 the costs of the original suit, and also the costs of said scire facias, to be levied of the goods, chattels and assets of his intestate the said John T. Wilkinson in his hands to be administered, if so much in his hands there be to be administered. And if so much there be not, then the costs aforesaid to be levied of the proper goods and chattels, lands and tenements of the defendant.

And whereas, on the 9th of October 1839, a writ of fieri facias issued on said judgment, directed to the marshal of Middle Tennessee, commanding him that of the goods, chattels and assets of John T. Wilkinson deceased, in the hands of Wm. H. Wilkinson, his administrator, to be administered, he should cause to be made the amount of said judgment, which writ was tested the first Monday in September 1839, and returnable the first Monday in March 1840, at which day the marshal of said district made the following return on said writ: No property found in the hands of William H. Wilkinson to be administered to levy this fieri facias.

S. B. MARSHALL, *M. M. T.*

And whereas, afterwards to wit, on the 13th of March 1840, on motion of the plaintiffs by their attorney, ordered by the court, that a scire facias de bonus proprius issue, &c. We therefore command you the said marshal, to make known to the said William H. Wilkinson, the tenor of this writ, and summon him personally to be and appear before the judges of our said court, at the court-house in Nashville on the first Monday in September next, then and there to shew cause if any he has or know of, why execution shall not be issued upon said judgment, to be levied of the goods and chattels, lands and tenements of the said William H. Wilkinson, administrator as aforesaid. Herein fail not, and have you then and there this writ, and make known how you have executed the same.

Witness the Honorable Roger B. Taney, chief justice of the Supreme court of the United States, this first Monday in March, in the year 1840, and in the sixty-fourth of our Independence.

Issued 22d June 1840.

JACOB M. GOVOCK, *Clerk.*

Upon which writ of scire facias is the following return:

"Came to hand 30th June 1840.

THO. L. MARSHALL, *D. M,*

Made known to W. H. Wilkinson and summoned him to appear as commanded.

"July 3, 1840.

"THOMAS L. MARSHALL,
Dep. Marshal.

And on the 7th of September 1840 the defendant appeared by his attorney and filed the following pleas:

JOSEPH N. AND LEVI DICKSON,
vs.
WM. H. WILKINSON, Adm'r of
JOHN T. WILKINSON.

And the said defendant John T. Wilkinson, by his attorney comes, and defends the wrong and injury, when and says, that the plaintiffs ought not further to have and maintain his aforesaid action thereof against him, or obtain judgment against him on the said scire facias mentioned, because he says, that he hath fully administered all and singular the goods and chattels, which were of the said John T. Wilkinson, the deceased, at the time of his death, and which have ever come to the hands of the said defendant, the administrator, to be administered, to wit on

And that the said defendant hath not, nor on the day, which the judgment mentioned in the scire facias was rendered against him, or at any time since the rendition of said judgment against him, had any goods or chattels, which were of the said John T. Wilkinson, deceased, at the time of his death, in the hands of the said defendant as administrator as aforesaid, to be administered. And the said defendant is ready to verify, wherefore he prays judgment of the plaintiff ought to have and maintain his aforesaid action thereof against him.

And the said defendant for further plea in this behalf says, acte non, because he says, that the estate of the said John T. Wilkinson deceased, is insolvent, and was insolvent at the time of defendant's taking out letters of administration on said estate, and that he the defendant, in pursuance of the act of the General Assembly in such case made and provided, suggested to the proper authority, to wit, the clerk of the county court of Sumner in writing the insolvency of said estate, to wit, on day of at ,

and the distribution of said estate was transferred to the commissioners appointed by said clerk in pursuance of the law, which has not yet taken place. And in pursuance of said law the defendant has filed a bill in the chancery court of Sumner against the plaintiff and other creditors of said estate, praying the distribution thereof be transfered to the said chancery court. All of which the defendant is ready to verify by the record, whereof he prays judgment of the plaintiff ought further to have or maintain his action against him.

JO. C. GUELD, *Alt'y for* WELKINSON.

This day personally appeared William H. Welkinson in open court, and made oath that the above two pleas are true.

W. H. WELKINSON.

Sworn to in open court, September 7, 1840.

JACOB M. GOVOCK, *Clerk.*

Demurrer to both pleas and joinder.

J. B. FOGG, *for Pltffs.*

SATURDAY, *September* 26, 1840.

JAMES N. DICKSON AND LEVI DICKSON, citizens of Pennsylvania,
vs.
WILLIAM H. WELKINSON, a citizen of Tennessee, Administrator of JOHN T. WELKINSON, dec'd.

In this cause a question occurs upon which the opinion of the judges are opposed as follow:

The plaintiffs, at September term 1837, with the defendant's consent, had a judgment of assets quando accederent; on the 2d of October, 1838, upon their suggestion of assets, come to the defendant's hands, a scire facias was accorded them to be made known to the defendant to shew cause why they should not have execution of those assets. This scire facias was issued on the 10th of January 1839, and after reciting the judgment quando, it contained the following and no other averment of the coming of assets to the defendant's hands. "And whereas, afterwards to wit, on the 2d day of October 1838, it was suggested to the said court on behalf of the said plaintiffs, that goods, chattels and assets had come to the hands of the defendant, sufficient to satisfy the said judgment, and it was thereupon ordered by said court, that a scire facias issue, and we therefore hereby command you, &c." This writ was made known to the defendant, and the plaintiffs thereupon by his default, at September term 1839, had judgment of execution of the in-

testate's goods in the defendant's hands to be administered, if so much, and if not, then the costs *de bonis propriis*. On the 9th of October 1839, execution was issued accordingly and returned to March rules 1840, *nulla bona* except as to the costs, which were levied *de bonis propriis*. A scire facias was now accorded against the defendant to show cause why the plaintiffs should not have execution of their demand *de bonis propriis*: and this writ was issued made known to the defendant and returned to September term 1840, when he appeared and pleaded to it fully administered and a special plea, that the insolvency of the intestate's estate had been suggested to the proper Tennessee authority, and a bill in equity filed in a State court to administer his affects according to the laws of Tennessee. To these pleas the plaintiffs demurred, and on the argument of the demurrer the defendant's counsel against awarding execution *de bonis propriis*, showed for cause, that the judgment by default upon the first scire facias did not etablish the fact, that any goods, &c., had come to the defendant's hands since the judgment of assets quando accederent, because the said first scire facias did not aver that goods, &c., had come to the defendant's hands since the said judgment quando, but only, that those goods had come to his hands, without saying when, and a judgment by default only admits such facts as are alleged; that unless the record showed that assets had come to his hands since the said judgment quando, and that such assets had been eloigned and wasted, no execution could issue against the defendant to be levied *de bonis propriis*. And the counsel for the plaintiffs insisted that advantage should have been taken of the alleged defect in the first scire facias at the term to which it was returnable and returned by plea or demurrer, that the judgment by default was a waiver of errors in the process, and so that the said error, if it be one, could not be reached by the demurrer aforesaid.

And upon said point—Whether advantage could be taken of the aforesaid defective averment in the first scire facias upon the plaintiff's demurrer to the defendant's pleas to the second scire facias the opinion of the judges are opposed.

And it is thereupon ordered, that the foregoing statement of facts, involving said point, upon which said disagreement occurs, made under the direction of the judges, and at the request of the plaintiffs by their attorney, be certified to the Supreme Court for their opinion upon said point, according to the act of Congress in that case made and provided.

UNITED STATES OF AMERICA, *ss.*,
District of Middle Tennessee.

I, Jacob M. Govock, clerk of the circuit court of the United States for the district aforesaid, do certify, that the foregoing is a correct transcript of the record of said court in the suit J. N. and

L. Dickson, plaintiff's against William H. Welkinson, administrator of John T. Welkinson, deceased, defendant.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in Nashville, this 14th day of October A. D. 1840.

[L. S.]

JACOB M. GOVOCK.